IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29-6-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Writ Petition No.6640 of 1998

The Management of
Tamil Nadu State Transport Corporation
(Coimbatore Division-II) Limited
Formerly known as 'Jeeva Transport Corporation'
represented b its Managing Director,
Erode. ... Petitioner

Vs.

1. The Presiding Officer,
Labour Court,
Salem.

2. K.S.Palaniswamy ... Respondents

This writ petition has been filed under Article 226 of Constitution of India, praying this Court to issue a writ of Certiorari, calling for the records pertaining to the award passed by the first respondent, made in I.D.No.16 of 1997 dated 28.7.1997 and quash the same.

For Petitioner : Mr.V.R.Kamalanathan
1st Respondent : Court
For 2nd Respondent : Mr.D.Hariparanthaman

O R D E R

This writ petition is filed by the management challenging the award passed in I.D.No.16 of 1997 dated 28.7.1997 on the file of the Labour Court, Salem, viz., the first respondent herein.

2. The brief facts of the case as stated in the affidavit are that the second respondent was working as Assistant in the Revenue Department of the Tamil Nadu State Transport Corporation (Coimbatore Division-II) Limited from 1983. The second respondent took leave from 6.3.1996 to 8.3.1996 by sending telegrams stating that he was not doing well. According to the management, it rejected the leave and informed the second respondent to join duty.

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The second respondent having failed to join duty, he was issued with a show cause notice on 19.3.1996. As the second respondent failed to give any explanation, an enquiry was ordered, after framing of charge, which reads as under,

> "You, while working as Assistant in the Headquarters Collection Audit Unit, continuously absented from duty from 6.3.1996, resulting in delayed auditing of the Collection sheet in the said Unit. You have sent leave applications through two telegrams for 6.3.1996, 7.3.1996 and 8.3.1996 and the Assistant Manager, Collection Audit Unit has complained that the said leave applications have been rejected. Your above action is an offence under Model Standing Order No.16(e)."

The crux of the charge is that the petitioner failed to attend duty from 6.3.1996 to 8.3.1996. An enquiry was conducted and the charge levelled against the second respondent was held to be proved. A second show cause notice was issued on 9.5.1996, for which the second respondent submitted explanation and after considering the same, the second respondent was dismissed from service from 5.6.1996 by order dated 4.6.1996. The second respondent aggrieved by that raised I.D.No.16 of 1997 and the Labour Court/first respondent herein, awarded reinstatement with continuity of service and also held that the second respondent is entitled to get 50% of backwages. The said award of the Labour court is challenged in this writ petition by the management.

3. The learned counsel for the petitioner argued that the petitioner's intimation for leave was rejected by the management and the same was communicated to the second respondent with a direction to rejoin duty and the same was proved by the management during enquiry, based on which final order of dismissal was passed, but the Labour Court, on the basis of not marking the communication sent to the second respondent, interfered with the findings of the Enquiry Officer and held that the Enquiry Officer's report is bad and consequently set aside the order of dismissal.

4. The learned counsel appearing for the second respondent submitted that the rejection of leave application was not intimated to the second respondent and no direction was issued to the second respondent to rejoin duty and no document to that effect was marked either during enquiry or in the Labour Court and the Labour Court having come to the conclusion that the enquiry was not properly conducted and held that the petitioner ought to have proved the guilt of the second respondent by adducing fresh evidence and by filing documents before the Labour Court/first respondent and

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having failed to do so, it is not open to the petitioner to challenge the award of the Labour court. The learned counsel also submitted that the charge itself is only absence for three days and for that the extreme penalty of dismissal is disproportionate and therefore the Labour Court is justified in interfering with the award and ordering 50% backwages.

5. I have considered the rival submissions of the learned counsel appearing for the petitioner as well as the second respondent.

6. The finding of the Labour Court is that the management failed to send the petitioner to the Medical Board and therefore the second respondent's absence cannot be treated as willful absence and that the second respondent was not served with the order rejecting the leave, by the management. The failure on the part of the management to file the document to show rejection of leave was served on the second respondent and the acceptance of two telegrams for the grant of leave by the management are also the finding of the Labour Court. It is also found that there was no proof to show that the second respondent refused to obey the order after receiving the direction given by the management to rejoin the duty. The Labour Court, after giving such a finding came to the conclusion that the allegation against the second respondent is not proved. Further the Labour Court held that even assuming that the charge is proved, dismissal from service is disproportionate to the gravity of the delinquency. Failure to send the second respondent before the Medical Board by the management vitiates the entire proceeding. The second respondent also could have verified from the management about his leave application submitted by him. Taking note of the said factual aspect the Labour court set aside the order of dismissal from service and ordered 50% backwages with continuity of service.

7. The said factual finding cannot be found illegal in view of the fact that the rejection of leave was not communicated to the second respondent by the management and hence the petitioner's refusal to rejoin duty cannot be treated as willful disobedience. The failure on the part of the management to send the second respondent to Medical Board is also fatal to the case of the management. Since the second respondent also failed to verify as to whether his leave was sanctioned 50% backwages was denied to him and the same was also accepted by the second respondent as no appeal was filed against the said decision.

8. The allegation against the second respondent is absence without leave for three days. For the said allegation even assuming that it was proved, dismissal from service is too harsh and it is to be treated as disproportionate to the gravity of the offence committed by the second respondent.

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9. The Honourable Supreme Court in the decision reported in AIR 1997 SC 3387 (Union of India v. G.Ganayutham), in paragraph 28 explained the proportionality in punishment as under,

> "The current position of proportionality in administrative law in England and India can be summarised as follows:-
>
> (1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.
>
> (2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.
>
> (3)(a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he has done.
>
> (3)(b) If the Convention is incorporated in England making available in principle of proportionality, then the English Courts will

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render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of 'proportionality' and assume a primary role, if left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Articles 19, 21 etc., are involved and not for Article 14."

In the said Judgment, the Honourable Supreme Court referred its earlier decisions reported in (1997) 3 SCC 72 = JT 1997 (2) SC 367 (Indian Oil Corporation Ltd & Another v. Ashok Kumar Arora) and (1995) 6 SCC 749 = JT 1995 (8) SC 65 (B.C.Chaturvedi v. Union of India and Others). In the case of B.C.Chaturvedi, in paragraph 18, the Supreme Court held as under,

"A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High

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> Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/ appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

9. In the light of the above cited decisions, the award of the Labour Court cannot be treated as perverse in any manner and the writ petition filed by the management is liable to the dismissed and accordingly dismissed. The award of the Labour Court is confirmed. No costs.

vr

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Presiding Officer, Labour Court, Salem.

+ one cc to Mr.V.R.Kamalanathan, Advocate Sr.No.27700.
+ one cc to Mr.D.Hariparanthaman,Advocate Sr.No.27752.

PV (CO)
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